No. 12330

In the United States
COURT OF APPEALS
for the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation,
Appellant,

vs.

MABLE E. WISTING,
Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF DISTRICT COURT AND THIS COURT

Appellee adopts Appellant's statement under heading "Jurisdiction and Pleadings" (Appellant's Brief, p. 1).

APPELLEE'S STATEMENT OF THE CASE

Appellee considers portions of Appellant's statement of the case (Appellant's Brief p. 2) inaccurate and the entire statement incomplete. Appellee, therefore, sets forth her own statement.

On May 26, 1927, Appellant issued to Appellee's husband a policy of life insurance promising to pay to the beneficiary of said policy upon due proof of his death while said policy was in force, the sum of $5,000.00. He died January 18, 1947; Appellee, his widow, was the beneficiary of the policy.

Due proof of death was furnished and demand was made. Appellant has refused to pay any sum whatsoever.

The anniversary of said policy was the 21st day of May of each year. During his lifetime the insured paid semi-annual premiums upon said policy for a period of nineteen and one-half years; the last premium payment was made on June 19, 1946, and was a semi-annual premium on said policy which was due on May 21, 1946. It was made during the grace period therefor.

On March 2, 1937, the insured borrowed $600.00 upon the policy; interest on this loan was paid each year on the anniversary of the policy when it became due according to the records of the Company; interest on this loan was never collected in advance but was always paid on the anniversary of the policy, May 21st. On October 28, 1946, the Company made an additional loan to the insured upon the policy. This loan was in the amount of $1394.00, and from the proceeds thereof the previous loan of $600.00 was deducted as well as interest at the rate of 6% upon said loan from May 21, 1946, until October 28, 1946. Thus on October 28, 1946, according to the records of the Company, there was an indebtedness against the policy in the sum of $1394.00.

Prior to obtaining this new loan, the insured executed a policy loan agreement in favor of the Company on a form furnished by it. This policy loan agreement provided that interest would be due upon said new loan on the next premium anniversary date of the policy which was May 21, 1947. On November 7, 1946, the Company mailed to the deceased a premium notice for the semi-annual premium due upon said policy on November 21, 1946. This notice set forth only the semi-annual premium due upon that date and contained no mention whatsoever of any interest due upon the loan. This premium was never paid.

On November 24, 1946, and during the grace period, the insured suffered a severe heart attack from which he died January 18, 1947.

The policy contained an automatic premium loan provision which provided that if a premium was not paid when due or within the days of grace thereafter the policy would remain in effect as long as the increasing loan value remained sufficient to pay for pro rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness on the policy, with interest. There is no dispute as to these facts. (Finding III-XVI inclusive, Tr. pp. 15-18 inclusive.)

The trial court found as a fact (Finding XVII, Tr. p. 18) that under the automatic loan provision the increasing loan value of the policy would have continued the policy in force until January 23, 1947, five days after the insured's death. Appellant attacks this finding (Specification of Error IIa, Appellant's Brief, p. 10).

The specification does not state particularly wherein the finding is alleged to be erroneous.

The trial court also found that there was no provision in the policy permitting the company to charge accrued interest upon the loan against the policy before interest became due, that the company attempted to charge accrued interest on said loan against the policy before it became due, that the charge of accrued interest before it became due would have lapsed the policy prior to the death of the insured, and that no notice of any charge of accrued interest before it became due was given to the insured. (Findings XX, XXI, XXII, XXIII, Tr. p. 19.) It also found: "That said deceased knew that he did not have to pay interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different interpretation on 'indebtedness,' for the purpose of lapsing the policy." (Finding XXVIII, Tr. p. 20.) Appellant likewise attacks these five findings. (Specification of Error IIb, Appellant's Brief, p. 10). The specification does not state particularly wherein each or any finding is alleged to be erroneous.

Finding VI (Tr. p. 16) to the effect that the insured performed all conditions precedent to continuing the policy in force (Specification of Error Ia, Tr. p. 9) is also attacked but Appellant again fails to state wherein the finding is alleged to be erroneous. Quite obviously, if the policy was continued in force until after the insured's death by virtue of the automatic loan provision, the

finding is proper. This is in effect stated by Appellant in its argument (Appellant's Brief, p. 13).

The loan agreement which the insured executed prior to obtaining the loan of October, 1946 (Defendant's Exhibit 8, Tr. p. 69), stated when interest became due, that the loan could be repaid in whole or in part at any time, the only possible circumstances under which accrued or accruing interest could be charged so as to terminate the policy, that is with notice to the insured, and that all terms of the policy, except as modified by the loan agreement, remained in force. The court found:

> "That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement particularly paragraph III. That defendant did not attempt to charge accrued interest thereunder and did not send notice of forfeiture thereunder." (Finding XXIV, Tr. p. 19.)

No objection is made to this finding.

Defendant's Exhibit 10 (Tr. p. 74) was introduced by Appellant at the trial of the case. Appellant's only witness, its secretary, testified that it represented the Company's calculation of the automatic loan against the policy and the various charges against it including premium charges. This exhibit is reproduced on page 8 of Appellant's Brief. It is the only evidence in the case which discloses the method of calculating the automatic loan value and the amount of premium to be charged against it. In this calculation Appellant attempted to charge against or deduct from said loan value interest on the loan of October 28, 1946, which was not yet due and would not be due until May 21, 1947. Computations using figures and methods identical to those used

by the Appellant in the preparation of this exhibit, but without deducting from the increasing loan value interest which was not yet due, disclose that Finding XVII (Tr. p. 18) is absolutely correct and that under the automatic loan provision the increasing loan value of the policy would have continued said policy in force until January 23, 1947. Therefore, unless Appellant had the right to deduct this interest, Appellee must prevail. This is the issue.

In view of Appellant's repeated erroneous statements about the way the amount of money that was loaned on October 28, 1946, was calculated we must point out the true facts as disclosed by the record in this regard. They are as follows: The loan agreement was prepared October 22, 1946; this date is indicated at the bottom of the loan agreement (Defendant's Exhibit 8, Tr. p. 69); the letter forwarding the loan agreement is dated October 22, 1946 (Appellant's Exhibit 8, Tr. p. 69). This letter stated that interest should be paid "on the next premium anniversary from the date of this loan, and annually thereafter"; it further stated that repayment might "be made in full or in part at any time." This letter contains a statement of the loan and indicates that from a loan of $1394.00 there was to be deducted the former loan of $600.00, together with interest thereon in the amount of $15.70 from May 21, 1946, until October 28, 1946, and that there would be a balance paid to the assured of $778.30. This letter is referred to because it shows that quite contrary to Appellant's assertion the insured did not delay in returning the loan agreement and that it was never contemplated that a

draft should be forwarded to him before October 28, 1946. Appellant's statement in its brief that the loan value of $1394.00 was calculated by deducting from $1401.00, the loan value as of November 21st, the amount of interest required for the period from the date of the loan to November 21st, to-wit, the amount of $7.00, and that the insured's delay in not returning the loan agreement until October 28th caused a credit in his favor on account of unearned interest is not supported by the facts. (Appellant's Brief, pp. 6 and 7.) The letter of October 22nd discloses that interest was calculated on the old loan up till and including October 28th and that the Company did not contemplate at any time delivering the funds to the assured prior to October 28th. Appellee in her argument will disclose how the figure of $1394.00 was reached.

Before concluding this statement Appellee wishes to note that Appellant in its statement devotes considerable space to contentions it asserts Appellee made at the trial and later abandoned. Although we disagree to a very substantial extent with Appellant's interpretation of our contentions at the trial and its statement that we abandoned them, no useful purpose can be served by further considering the matter. Those contentions are not before this court. The trial court made its findings and conclusions. Appellant has taken this appeal and stated the points upon which it relies (Tr. 36). Its brief should be thus directed.

Appellant contends that it had a right to charge accrued or accruing interest which was not due against the automatic loan value without giving the policy holder

any notice whatsoever. Appellee contends that it had no such right and that by so doing it in effect terminated the policy by foreclosure without notice. Appellant is on the horns of a dilemma. If it relies upon the provisions of the loan agreement, which was and is the only possible authority for a charge of accrued interest before it was due, it admits it foreclosed the policy without notice. If it does not rely upon the loan agreement, it is without any authority whatsoever to charge this accrued or accruing interest. It, therefore, ignores the loan agreement. Inasmuch as it had no possible authority to make this charge other than the loan agreement, the policy remained in effect under the automatic premium loan provision until the after the death of the insured.

SUMMARY OF ARGUMENT

Appellee will argue as follows:

1. Under the evidence produced at the trial and now before this court if interest which was not due was not deductible from the increasing loan value under the automatic loan provision the policy would have remained in force until January 23, 1947.

2. No interest was due on the loan until May 21, 1947.

3. In the light of the evidence this interest was not deductible from the increasing loan value.

4. Under the law applicable to policies with automatic loan provisions this interest is not deductible from the increasing loan value.

5. Cases and texts cited by Appellant which deal with extended insurance and not automatic premium loans are not in point and are not authority for Appellant's claim that this interest is deductible from the increasing loan value.

6. That Appellant's argument ignores the evidence and is generally unsound.

ARGUMENT

I.

Computations using identical methods and figures to those used by Appellant in its Exhibit 10 disclose that the policy would not have expired until January 23, 1947, if interest which was not yet due had not been deducted from the increasing loan value.

For the convenience of the court we reproduce Defendant's Exhibit 10 (Tr. p. 74) at this point.

GEORGE H. WISTING

POLICY NO. 34538

Cash value as of 5-21-46	$1,356.00	Policy Loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	Loan interest due and unpaid from 10-28-46 to 11-21-46	5.16
Difference for year	$ 90.00		
		S-A Premium due 11-21-46	$66.05
No. of days from 5-21-46 to 11-25-46=188		No. of days from 11-21-46 to 11-25-46=44	
		——=% (S-A Basis)	
		182.5	

Amount of increase		Amount of premium due 11-21-46 to 11-25-46	1.45
$\frac{188}{365} \times \$90.00$	46.36	$\left(\frac{4}{182.5} \times \$66.05\right)$	
		Additional interest 6% on loan 11-21-46 to 11-25-46	1.81
Cash value as of 5-21-46	$1,356.00	$\left(\frac{4}{182.5} \times .06 \times \$1,394.00\right)$	
Total cash value 11-25-46	$1,402.36	Total loan outstanding 11-25-46	$1,402.42

Now using identical methods, figures and calculations we will set forth a computation omitting the charges for interest which was not yet due.

Cash value as of 5-21-46	$1,356.00	Policy loan on 11-21-46	$1,394.00
		S-A Premium due 11-21-46	$66.05
Cash value as of 5-21-47	1,446.00	No. of days from 11-21-46 to 1-22-47=63	
Difference for year	90.00	$\frac{63}{182.5}$=% (S-A Basis)	
No. of days from 5-21-46 to 1-22-47=247			
Amount of increase		Amount of premium due 11-21-46 to 1-22-47 inc.	
$\frac{247}{365} \times \$90.00 =$	60.90	$\left(\frac{63}{182.5} \times 66.05\right)=$	22.80
Total cash value on 1-22-47	$1,416.90	Total loan outstanding 1-22-47	$1,416.80

This computation discloses that the policy should have remained in force through January 22, 1947, the

total cash or loan value exceeding the loan outstanding on that date by approximately 10 cents.

The following identical table shows conditions on January 23, 1947:

Cash value as of 5-21-46	$1,356.00	Policy loan on 11-21-46	$1,394.00
Cash value as of 5-21-47	1,446.00	S-A Premium due 11-21-46	$66.05
Difference for year	90.00	No. of days from 11-21-46 to 1-23-47=64	
No. of days from 5-21-46 to 1-23-47=248		$\frac{64}{182.5}$=% (S-A Basis)	
Amount of increase		Amount of premium due 11-21-46 to 1-23-47 inc.	
$\frac{248}{365} \times \$90.00 =$	61.15	$\left(\frac{64}{182.5} \times 66.05\right)=$	23.16
Total cash value on 1-23-47	$1,417.15	Total loan outstanding 1-23-47	$1,417.16

This computation discloses that on January 23, 1947, the automatic loan against the policy exceeded the loan value by approximately one cent. We state, therefore, that using Appellant's figures and method of calculation but not deducting interest not yet due, the policy did not lapse until January 23, 1947, and was, therefore, in force on January 18, 1947, the date of the death of the insured. It should be noted that Appellant probably at one time so calculated for the reason that its own records disclose that the policy lapsed on January 23, 1947. In this connection we refer the court to Defendant's Ex-

hibit 8 (Tr. p. 69). A small pink slip in said file, which is apparently the Company's own record of the premium notice having been sent to the insured, recites on the back thereof as follows: "Lapsed 1-23-47." The yellow collection card in said exhibit likewise on the back thereof contains the following: "Lapsed 1-23-47." It should be noted that in each case the word "lapsed" is part of the printed form; 1-23-47 is written in pen and ink. No explanation was made of this entry at the time of the trial. When Plaintiff taxed Defendant with this fact in her brief in the trial court, counsel for the Defendant attempted to explain the entry by stating that the lapse was entered in the records on January 23, 1947. The explanation, it seems, imposes upon even the most credulous and stretches the point of coincidence far beyond any reasonable limitations. It seems more reasonable to assume that Appellant once calculated that the policy lapsed on January 23, 1947, and after receiving notice of the insured's death changed its mind.

We wish to emphasize again that Exhibit 10 was produced by the Appellant and vouched for by it; that it contains Appellant's figures and methods of calculation and is the only evidence before the court touching upon the matter. Appellee has built her case on this exhibit and has never questioned it except its deduction of interest which was not due. Appellant is not in a position to question it in any particular.

II.

No interest was due on the loan until May 21, 1947.

This statement is in accordance with Finding XIII (Tr. pp. 17-18). No objection is made to this finding.

In view, however, of the fact that Appellant in its brief is strangely silent as to when interest on this loan was due, we deem it advisable to review the evidence in this regard. First, the loan agreement quite definitely provided that no interest was due upon the loan until the premium anniversary date. It provided that the insured agreed "to pay the company on the next premium anniversary date of said policy interest on said loan at the rate of 6% per annum from the date of this agreement to said anniversary, * * * ." (Defendant's Exhibit 8, Tr. p. 69, Loan Agreement, paragraph 1.) The court definitely found that May 21st was the anniversary of the policy. (Finding IX, Tr. p. 16.) Appellant's only witness testified that the next anniversary date of the policy was May 21, 1947 (Tr. p. 81). That interest was due only on the anniversary date is further borne out by Plaintiff's Exhibit 3 (Tr. p. 66), being the receipt for the premium due May 21, 1946. This receipt shows the collection of a year's interest on the $600.00 loan, or the amount of $36.00, at that time. The premium notice which was mailed to the insured covering the premium due November 21, 1946, made no mention whatsoever of interest (Plaintiff's Exhibit 4, Tr. p. 76). In addition to this evidence, which shows that there was no interest due until May 21, 1947, and that the company never considered that any was due, we call the court's attention to a letter in the company file (Defendant's Exhibit 8, Tr. p. 69). This letter was written by the Company to Wisting and is dated June 29, 1945. It stated "In-

terest on a loan is payable but once a year on anniversary date of policy regardless of how premiums are paid".

In order to preserve an explanation of Appellant's which appeared in its brief in the trial court relative to certain notations on Defendant's Exhibit 9 (Tr. p. 74), Appellee caused portions of her memorandum brief and Defendant's memorandum to be included in the transcript of record (Tr. pp. 42-44, inclusive). This material shows that immediately upon making the loan of October 28, 1946, Appellant calculated the amount of interest which would be due thereon on May 21, 1947, and the annual interest thereon thereafter. This is at complete variance with any suggestion of Appellant that it contemplated any other method of payment of interest and at complete variance with its statement that the figure $1,394.00 was reached by deducting $7.00 interest from $1,401.00. The figure $1,394.00 was reached as follows:

Cash value 5-21-46	$1,356.00
No. of days 5-21-46 to 10-22-46=155	
Difference for year $90.00	
$\frac{155}{365} \times 90.00 = 38.22$ (rounded off to 38.00)	
$1,356.00	
38.00	
	$1,394.00

It has been demonstrated without question that neither Wisting nor the Company ever considered that

any interest was due on this loan until May 21, 1947. Finding XXVIII is thus supported (Tr. p. 20).

III.

The evidence discloses that this interest which was not yet due was not deductible from the increasing loan value of the policy under the automatic loan provision.

In determining whether or not interest was deductible from the increasing loan value under the automatic loan provision it is proper to consider not only the policy but also the loan agreement and the remaining evidence in the case.

It is submitted that the language in said automatic premium loan provision "existing indebtedness hereon with interest" means interest which is due and not, as Appellant suggests, interest which would not become due for six months (Plaintiff's Exhibit 2, Tr. p. 66). There is not one word in said automatic premium loan provision permitting the Company to charge accrued or accruing interest before it is due. The only place accrued or accruing interest is mentioned is in the loan agreement, consideration of which Appellant so studiously avoids. This loan agreement (Defendant's Exhibit 8, Tr. p. 69) specifically provides as follows in paragraph 8 thereof:

> "8. All conditions, limitations, and requirements of said policy, except as expressly modified herein, shall remain in full force."

It further provides as follows:

> "3. Failure to repay said loan, with interest, as herein provided, or to pay any indebtedness on ac-

count of said policy, or the interest thereon, shall not terminate the policy unless the total indebtedness thereunder, including accrued or accruing interest, shall equal or exceed the loan value of the policy at the time of such failure. In this event the policy shall terminate thirty-one days after the Company shall have mailed notice to the last known address of the Insured and any assignee of record, and be deemed surrendered in consideration of the cancellation of all indebtedness thereunder."

This last quoted paragraph of the loan agreement provided the circumstances under which accrued or accruing interest before it was due might be charged. In order to charge this accrued or accruing interest, if it could be charged thereunder, and cause the policy to be terminated on account thereof it was necessary for the Company to give the insured thirty-one days' notice. This the Company did not do. Therefore, accrued or accruing interest so as to forfeit the policy could not possibly be charged under this paragraph. Had the notice been given, the policy could not have been terminated until the expiration of thirty-one days. Under such circumstances the insured could have made a payment on the loan and the policy would still have been in force. In this connection the loan agreement provides:

"2. The whole or any part of the indebtedness may be repaid at any time while the policy is in force."

It is submitted that if this notice had been given, the insured would have been advised of what the Company was doing and could have made a payment either on the premium or on the loan to keep the policy in effect.

Quite obviously, since he was on his death bed, a payment would have been made.

Appellant in its brief has stated on numerous occasions that it is contending that the policy lapsed for nonpayment of premium and was not forfeited for failure to repay a loan, or a portion thereof, or interest thereon. We could agree with this statement if Appellant were contending that the policy lapsed on January 23, 1947. If this policy lapsed prior to January 23, 1947, it lapsed because the Company foreclosed it without notice, contrary to the provisions of paragraph 3 of the loan agreement. Appellant cannot say that the policy lapsed prior to the death of the insured for nonpayment of premium when the lapse would not have occurred had it not attempted to foreclose the policy without notice. It is submitted that under the facts of this case the only possible authority for the Company to charge this interest before it was due was in paragraph 3 of the loan agreement, and that if it charged this interest under said paragraph, it attempted to foreclose the policy and forfeit the insured's rights thereunder without notice. This paragraph likewise limited any possible right Appellant might have had under the policy outside the loan agreement to charge said accrued or accruing interest.

IV.

Under the law applicable to automatic premium loan provisions, interest which is not due is not deductible from the increasing loan value so as to hasten the forfeiture of the policy.

The foregoing is an established principle.

> "Interest accrued but not due may not be added to the principal in determining whether the total indebtedness equals the cash surrender value of the policy so as to permit its forfeiture or cancellation." 44 C.J.S., Sec. 337, pp. 1290, 1291.

Unquestionably this is exactly what Appellant attempted to do in the instant case. This is undeniable, for most certainly if this interest could not be charged until after it was due, the policy would have been in effect at the date of the death of the insured. If it could be charged, the policy would have been forfeited prior to his death. Appellant cannot claim that this charge which it made did not hasten the forfeiture.

The case of *Walsh v. Aetna Life Ins. Co.* from the Pennsylvania Supreme Court (1945) 160 A.L.R. 620, 43 A. (2d) 102, is directly in point. In that case the court was concerned with an automatic premium loan provision similar to the one here, and in that case the company included in its calculation of indebtedness an item of interest upon a cash loan for a six months period, which interest was not yet due and would not become due until the end of the policy year. The court aptly concluded that this interest was not deductible. A condensed statement of the court's holding appears in headnote 3 of the report in A.L.R. as follows:

> "Where interest on a life insurance policy loan is not due and payable until the anniversary date of the policy, accrued interest not yet due may not be taken into account in determining whether the loan value has been equaled or exceeded, for the purpose of ascertaining the amount available as an automatic loan wherewith to pay a premium."

The policy in that case carried an automatic loan provision similar to the one in the case at bar and it was definitely decided that the loan value to pay said automatic premium could not be reduced by deducting therefrom interest which was not yet due. It is submitted that under the authority of this case and the law forbidding charges of interest which is not yet due in order to hasten forfeitures, Appellee's husband's policy was in force until January 23, 1947.

V.

Appellant's authorities are not in point.

Before quoting from any cases Appellant makes the statement that cases dealing with extended insurance as distinguished from automatic premium loans are authority supporting its position that interest not yet due was deductible from the increasing loan value in this case so as to hasten the forfeiture of the policy. A very substantial difference exists between cases where loan value less indebtedness is used to purchase extended term insurance and where it is used to keep the principal policy in force under automatic premium loan provisions. In the case of extended insurance the principal policy is terminated and extended term insurance is purchased. In the case of automatic premium loan provisions the principal policy is kept in force.

Reference to the policy in the instant case substantiates this statement. We quote in part from paragraph VI of said policy:

"VI. GUARANTEED SURRENDER OPTIONS.

"After three full years' premiums have been paid hereon, if any subsequent premium is not paid when due, the insured, upon surrender of this policy to the Company, and upon written request, both within the month of grace, shall be entitled to one of the following options:

* * * * *

"Third—EXTENDED INSURANCE. A participating term insurance policy payable at the same time and under the same conditions as this policy."

* * * * *

We also quote paragraph XIII thereof:

"Any indebtedness to the Company hereon will be deducted in any settlement hereunder upon the death of the Insured or in payment of any other benefit. If this policy shall lapse and there shall be an indebtedness hereon, the said indebtedness will be deducted from the cash value of the policy at date of default, shown in Column 1, and the balance will be (a) paid to the Insured in cash, or (b) applied to the purchase of a participating paid-up insurance policy, payable at death, or (c) applied to purchase a participating term insurance policy for the face amount of this policy less any indebtedness, at the request of said Insured and the surrender of this policy during the month of grace. If no such request is made the 'Automatic Premium Loans' benefit will be applied to this policy."

It is immediately quite apparent that in the case of extended term insurance the principal policy is out of existence. Under the automatic premium loan provision, which appears in Appellant's Brief on page 15, it is quite apparent that the principal policy remains in existence and that at any time while it is in force under

said provision the insured may resume payments without medical examination. Under these circumstances, if the insured had received notice of the termination from the Company as required by the loan agreement rather than a lapse letter on January 8, he could have resumed premium payments or paid something on the loan (Plaintiff's Exhibit 6, Tr. p. 72).

We will consider the two cases which Appellant cites.

In the case of *Reynolds v. Northwestern Mutual Life Insurance Company,* 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603, the reserve under the policy was $1,607.50. The amount of the loan was $1,575.00. The loan instrument recited that interest on the loan was "payable annually" and also contained a provision practically identical with paragraph 5 of the loan agreement before this court, to-wit:

> "5. If the policy be surrendered for Extended Term Insurance the then existing indebtedness shall be adjusted as provided in the policy, or in accordance with the Company's practice if the policy contains no provision relating thereto."
>
> Loan Agreement, Defendant's Exhibit 8 (Tr. p. 69).

The policy in the *Reynolds* case provided for extended term insurance in the event of default in the payment of premiums.

Quite obviously under the provision comparable to paragraph 5 in Appellant's form of loan agreement there was authority to adjust existing indebtedness when the policy became extended term insurance.

This provision in the *Reynolds* case under which the court held the company had a right to charge accrued interest not due in the case of extended term insurance has no application where the principal policy is continued in force under the automatic premium loan provision. The loan agreement in the instant case permits the adjustment only in the event the policy be terminated and changed to extended term insurance.

In the *Reynolds* case in the light of the fact that the loan agreement provided that accounts should be squared at the time extended insurance became effective, the court construed the term "payable annually" to mean capable of being repaid. Incidentally, in the loan agreement before this court the words "payable annually" are not used. The loan agreement before this court provides "to pay the Company on the next premium anniversary date". The court in the *Reynolds* case stated that the fact that the policy provided that a loan "may be repaid at any time while this policy is in force, except as extended term insurance" indicated that accounts were to be squared before the extended term policy was issued. The court in the *Reynolds* case also stated as its conclusion that the term "payable annually" in the loan agreement had no application "to the adjustment of accounts incident to the conversion of the original insurance into extended term insurance". The court in the *Reynolds* case made it quite clear that a far different situation from the situation in the instant case, where the original policy remains in full force and effect and where premiums may be resumed any time and the loan may be repaid in whole or in part

at any time, is presented when the original policy becomes nonexistent by virtue of the fact that it is cancelled and a policy of extended insurance is issued.

In the case of *Garrett v. Northwestern Mutual Life Insurance Company,* 111 Ind. App. 502, 38 N.E. (2d) 74, Appellant likewise quotes from a case in which the reserve was to be used to purchase extended insurance. The principal policy was terminated and extended insurance purchased. Obviously the court concluded that in such a situation accounts upon the old policy should be squared. We quote from the opinion of the court:

> "We think the clear intent is that interest on any loan shall be determined to the date of the default and a complete balance of accounts on account of the policy be made in finding the amount available to purchase extended insurance."

Appellant's quotation from Appelman likewise deals with extended insurance. It is quite clear that the cases on extended insurance do not apply to situations where the automatic premium loan provision is considered.

VI.

General discussion.

Before concluding we wish to call to the court's attention certain very well recognized principles which are so well known that they need no citation of authority to support them.

It is well known that insurance contracts should be construed liberally in favor of the insured and strictly against the insurer. *Stipcich v. Metropolitan Life Ins.*

Co., 48 S. Ct. 512, 277 U.S. 311. It is likewise well known that in case of ambiguity construction of a policy will be adopted which is most favorable to the insured. *Mutual Life Ins. Co. of New York v. Hurni Packing Co.,* 44 S. Ct. 90, 263 U.S. 167, 68 L. Ed. 235, 31 A.L.R. 102. *New York Life Ins. Co. v. Hiatt,* 140 Fed. (2d) 752 (Ninth Circuit).

Statements of general principle such as these and also the well known general principle that forfeitures are not a favorite of the law clearly establish that Appellee is entitled to prevail in this appeal and that this court should hold that the Company had no right to deduct from the increasing loan value under the automatic premium loan provision of the policy any interest which was not yet due, and that in attempting to deduct this interest which was not yet due Appellant violated the positive provision of the loan agreement and actually caused a forfeiture of the policy by a foreclosure without notice.

CONCLUSION

It has been definitely established that if the Company had not charged interest before it was due against the increasing loan value, the policy would have been in force at the time of the insured's death. It has been further established that the only possible authorization to charge this interest was under the loan agreement and that if it was charged under said agreement, notice to the insured was required to be given. It has likewise

been definitely established that no notice of any such charge was ever given to the insured. Therefore, Appellant's effort to cause the policy to be forfeited prior to the insured's death by making this charge is unavailing, and in computing the length of time the policy remained in force this interest not yet due cannot be taken into account. It is the law that charges of accrued interest to hasten forfeitures are not permitted and that in calculating the amount available for an automatic premium loan interest charges not yet due will not be deducted. Cases dealing with extended insurance are not in point.

After hearing all the evidence in this case and reaching its decision, the trial court rendered a memorandum decision. It was not until Appellant tried to re-argue the case on its objection to the findings submitted by Appellee and to request findings that were entirely unsupported by the evidence that the trial court saw fit to make certain observations which Appellant did not enjoy. Any castigation that Appellant may have received therein was brought about by Appellant alone.

It is respectfully submitted that the case should be affirmed and Appellee allowed an additional attorney fee for services in this court.

Respectfully submitted,

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